STATEMENT OF ALAN FRANK

President, Post-Newsweek Stations Inc.

appearing on behalf of

Network Affiliated Stations Alliance

Senate Committee on Commerce

July 17, 2001

STATEMENT OF ALAN FRANK
President, Post-Newsweek Stations Inc.
appearing on behalf of
Network Affiliated Stations Alliance
Senate Committee on Commerce
July 17, 2001

Mr. Chairman and members of the Committee:

My name is Alan Frank. I am president of Post-Newsweek Stations and chair of the Network Affiliated Stations Alliance (NASA), a group that represents the more than 600 local TV stations across America that are affiliated with the ABC, CBS, and NBC networks and that strongly opposes any increase in the national television ownership cap. I also serve on the Board of the NAB, which shares our view that the ownership cap should not be increased. I am pleased to appear at this hearing on behalf of the local affiliates in this country who work every day to operate quality local stations that present a blend of local programming, news, syndicated programming and national network programming. I'm also pleased to be here with Mel Karmizan. We want the networks to grow and prosper, because their doing so will make them stronger and more valued partners to the affiliates. CBS and the other networks have to be vital partners in providing our communities with successful programming.

Before I launch into the views of local broadcasters on the important matter of ownership rules, it may be helpful to put some basic industry facts on the table, since I appreciate that you have lots of industries to keep track of within the broad jurisdiction of this Committee. The broadcast television networks are in the business of acquiring or producing prime time entertainment, news and sports programming, selling advertising time to national advertisers for insertion inside the programming, distributing that programming and advertising to local stations, and owning some television stations, mostly in major markets, to carry that programming and advertising. The television networks are anxious to reach 100% of the audience, because that helps them charge higher rates to advertisers. To accomplish this goal, in each of the two hundred or so television markets in the country, the networks either own a station, known as an owned-and-operated station (O&O), or they enter into a contract to have a local broadcaster act as an affiliate. Under current law, no network is permitted to own stations that reach more than 35% of the national audience; thus, 35% is the national television ownership cap.[1] As a consequence, local stations that affiliate with a network are an important part of the networks' business model. My company has a typical arrangement -- we run six stations and have affiliate agreements with each of the three major networks. In addition to arranging to carry network programming, we also produce our own local news, public affairs and entertainment programming; we carry some local sports; we carry charity telethons and other specials such as "Billy Graham Specials;" and we buy syndicated programming, which includes everything from "Jeopardy" to "Frasier" reruns. We are also responsible for selecting the mix of these ingredients based on informed views of what best serves the public in our community.

The system that I just described provides strength and flexibility to our broadcast service. Indeed, Chairman Hollings, Senator Stevens, Senator Inouye, Senator Burns, Senator Lott, Senator Dorgan, Senator Cleland, Senator Boxer, and Senator Edwards, joined by an equally bipartisan number of House colleagues, recently made this same point to Chairman Powell:

---

[1] The Telecommunications Act of 1996 set the national television broadcast ownership cap at 35%, and this cap is reflected in the rules of the Federal Communications Commission (FCC). Telecommunications Act of 1996 § 202 (c)(1)(B); 47 C.F.R. § 73.3555(e)(1). Since the early 1980s, the national ownership rule has moved from 7/7/7 (7 AM, FM and TV stations), to 12/12/12 (12 AM, FM, and TV stations, with a limit on the aggregate reach of the twelve television stations to 25 percent of the national audience), to 35% of the national audience.

> Two of the hallmark principles of the Communications Act are localism and diversity, and our uniquely American form of broadcasting, with its combination of national networks and local, independently-owned and -operated broadcast outlets, reflects these core principles. We are committed to making sure that as the media industry evolves and consolidates, the voice of local broadcasters is not stifled or silenced. The national ownership cap at its current level serves a critical role in preserving localism.[2]

We commend Chairman Hollings and the many members of the Committee for this strong letter in support of localism and against any increase in the national television ownership cap. That view, which also is backed by NASA and the National Association of Broadcasters (NAB), sends a powerful message to Chairman Powell and the FCC as they review the broadcast ownership rules.

The question facing the Committee as it considers the matter of national television ownership rules is simple: Will there continue to be a variety of companies -- Mel Karmizan's; my company; Jim Keelor's company, Cosmos; Jim Yager's company, Benedek; Ben Tucker's company; Stan Hubbard's company; and dozens and dozens of others -- making critical news and programming decisions in America? Or at the next ownership hearing held five years from now, will Mr. Karmizan be here alone, one person able to testify for the entire broadcast industry because the networks, run out of New York and Hollywood, collectively will own most of the country (and will be able to take the rest for granted)?

This scenario cannot be dismissed. Consider how quickly the industry has changed in just a few years. Today, Mr. Karmizan has stations reaching 41% of America. His colleagues at ABC, Fox, and NBC control stations reaching 24%, 41%, and 27% respectively. By contrast,

---

2 Letter to Chairman Michael Powell from Senators Hollings, Stevens, Inouye, Burns, Lott, Dorgan, Cleland, Boxer, Edwards, Helms, and Represenatives Dingell, Markey, Burr, and Pickering (Attachment 1).

my company has stations reaching 7%, and no affiliate group has stations that reach more than 30%. This growth in network power is remarkable and is felt in significant ways across the broadcast community. Before the 1996 Act was passed, the three major networks reached no more than 1 in 5 households through their O&O stations.

The networks were able to expand their audience reach because in 1996, the national broadcast ownership cap was increased from 25% to 35%. NASA, along with Senators Dorgan and Helms and many others, wanted to keep the cap at 25%. Many of the members of this Committee expressed concern about the repercussion of increasing the cap to 35%. While we appreciate the compromise worked out by Chairman Hollings, Senator Dorgan, Senator Lott and others during debate of the 1996 Act, I can tell you that your fears were well founded. Make no mistake: as a result of that change the networks have increased their holdings and their power just as the leadership of this Committee predicted. The result is that today local broadcasters have less independence, less ability to make sound programming decisions for their local communities. An increase to 45% or 50% would be a disaster and I believe that even at 35% we are at risk of becoming passive conduits for the networks' daily feed of news and programming. As the recent letter from many members of this Committee clearly stated to Chairman Powell:

> The national ownership cap is vital to ensuring that television programming decisions remain in the hands of local broadcasters, and that media power does not become concentrated in New York or Los Angeles. The national broadcast ownership cap is not, as some wrongly suggest, just about competition. Local input helps keep our broadcast system responsive to the views of local communities across the country. That diversity of viewpoint benefits our democracy.[3]

The local affiliates share this view that localism is the core of our broadcast system and that any increase in the national ownership cap puts those values at risk. We greatly

---

[3] *Id.* at 2.

appreciate the strong leadership that Chairman Hollings and so many distinguished members of this Committee have demonstrated on this issue. We also welcome the opportunity to set out the case in detail why the networks' bid to increase the ownership cap should be rejected. In the past, the networks have asserted four reasons why the ownership cap should be lifted or repealed: (i) the financial health of the networks and the future of free, over-the-air television are at stake; (ii) the world of television has changed in recent years and the rules are unnecessary and antiquated; (iii) national ownership rules do not promote localism or diversity; and (iv) the ownership cap is unconstitutional. Let me consider each of these issues in turn.

I. The Networks Do Not Need To Own More Stations To "Save Free, Over-The-Air Television."

In 1996, when the ownership cap was being debated, the networks complained that they were going broke in the network business and needed to own more stations. They were granted their wish and now are back here a few years later, repeating their plea: somehow the future of free, over-the-air television is again at stake unless Congress increases the ownership cap. This claim suffers from what I call "the fallacy of Hollywood accounting." In making this claim, the networks are asking you to myopically focus on the artificial accounting system they've set up, a system that separates the part of the business that buys and distributes programming from the part of the business that makes, owns, or syndicates programming, from the part of the business that owns TV stations, from the part of the business that makes money from cable and Internet programming. But this argument proves too much. If a single network owned 100% of the stations in America, it still would show only moderate network profits because the profits from syndication, cable and Internet services do not flow to the network portion of the balance sheet. For a more accurate picture of network profits, one needs only review their financial reports to Wall Street analysts. Even a cursory review of those financial reports, shows that their vertically integrated programming and distribution businesses are highly profitable. CBS Network enjoyed a 19% increase in profits from 1999 to 2000 after a 59% increase in profits from 1998 to 1999 and a 19% profit increase from 1997 to 1998.[4] The four networks, collectively, have 2000 profits (even with "Hollywood accounting") of over four billion dollars!

Over the past decade the networks have benefited from a number of rule changes that have allowed them to strengthen their competitive position. Remember in the late 1980s and early 1990s, the networks argued for repeal of the financial interest and syndication ("fin/syn") rule, which prohibited the networks from producing and syndicating their own shows. After much discussion and with some trepidation, the local affiliates supported the networks on that issue and the FCC repealed the rule. How has this rule change benefited the networks? Today, the networks own a substantial part of the programming they distribute and many independent programmers have exited the market. Some critics have complained that the fact that the networks own the programming may affect their judgment, leading them to keep a show on the air so that they get to the magic number of 100 episodes needed to take the show into syndication. At the moment, there's an active debate on whether network ownership of shows impacts the primetime schedule and causes independent producers to be squeezed out. These

---

[4] CBS figures for years 1996-99 represent the revenue and profit data reported for CBS' "television segment" in the Forms 10-K and 10-K/A for CBS Corp. filed on March 29, 2000 and August 5, 1999, respectively. According to these reports, the television segment of CBS Corp. for years 1996-99 consisted of three integrated operations: the CBS television network, the CBS owned and operated television stations, and CBS' television syndication operations.

On May 4, 2000 CBS Corp. merged with Viacom Inc. CBS figures for year 2000 represent the revenue and operating income data reported for Viacom's television segment in the Form 10-K for Viacom Inc. filed on March 28, 2000. The television segment for Viacom Inc. consists of the CBS and UPN television networks, 39 owned and operated television stations, Viacom's television production and syndication business.

debates will cease if the networks owned more local TV stations, because the O&O stations will just be passive and quiet conduits for the network programmers.

The networks also benefit from their affiliates when a program is made popular by affiliate carriage then goes into syndication. For instance, I and other affiliates carry a CBS program such as "Everybody Loves Raymond," which helps make it a popular program and enables CBS to take it to the syndication market. Once a show goes into syndication, I could well face a situation in which I have to compete against a station across town that is carrying a syndicated CBS program that I helped make popular. How did that program become so valuable in the market? Because I carried it for CBS. Now, it is true that the owners of programming taken into syndication always reaped the financial benefits, today the networks gain substantial revenue because they now own a significant portion of the programming. This same reasoning applies to network programming that is "repurposed" and distributed on a cable network. The networks reap the value of national distribution and branding that the affiliates make possible.

In short, the networks and their related businesses are growing and prospering financially. Because of lifting the fin/syn rule and the ownership cap to 35%, along with other rule changes over the past five years such as relaxing the dual network and duopoly rules, the networks are doing quite well, thank you, and as a byproduct of these changes are expanding their dominance over affiliates. The networks' position is that free, over-the-air television is at stake if the cap is not lifted, whereas the fact is that localism and diversity are at stake if the cap is not retained.

II. The World Of Television Has Changed, But The Networks Continue To Hold Substantial Power.

On one point, the networks are right. The world of television has changed substantially in recent years. Since the last time a representative of the network affiliates appeared before this Committee to testify on broadcast ownership rules, six years ago, the following has taken place: Disney bought ABC/Cap Cities, a move that was a direct result of repeal of the fin/syn rule; Westinghouse bought CBS, and then dropped the Westinghouse name; CBS of course bought Mr. Karmizan's company, Infinity Broadcasting; Viacom bought CBS; Fox has agreed to buy Chris-Craft. This flurry of deals led the FCC to report recently that thanks to mergers and acquisitions, competition in the industry lessened rather than increased since the Telecommunications Act of 1996 was passed.[5]

In response to this argument, the networks say that this is just an intramural squabble about relative bargaining power inside an industry that is challenged to keep pace with the dynamic of competing media, and therefore they argue that neither Congress nor the FCC should get involved. Thus, the networks focus almost exclusively on the general market for video news and entertainment and conclude that any increase in television network ownership will not alter the broader competitive landscape. This argument is off the mark because it ignores three markets in which competitive conditions have a direct bearing on the continued justification for the national ownership rule: (1) what the Commission has termed the "market where networks meet stations," (2) the market for syndicated programming, and (3) the market for advertising.

(1) Network/Affiliate relations. Under our system of broadcasting, networks and local stations are both collaborators and competitors. If I have a CBS affiliate (and I have two -- in Jacksonville and Orlando), in many ways I'm in business with Mel Karmizan. When he gets a

---

[5] *Biennial Review Report*, at ¶¶ 27-28 (Excerpts in Attachment 2). Former Commission Chairman William E. Kennard said that the consolidation that has occurred since 1996 in the television industry, both horizontal and vertical, has been "unprecedented." Sallie Hofmeister, *FCC to Propose Easing Broadcast Ownership Rules*, LOS ANGELES TIMES, May 31, 2000, at A1 (quoting Kennard).

hit show, I benefit. When he needed to spend money for the NFL football package, I helped pay for it. In fact, when the bill for the NFL package came due, Mel Karmizan emphasized that we were collaborators. But this is supposed to be collaboration, not capitulation. Under the strict terms of the law, written by Congress into the Communications Act of 1934 and reflected in the FCC's rules, I am not supposed to turn over the keys to my stations to CBS. I'm there to run local stations. Sometimes I produce programming myself, sometimes I buy it from others, and some parts of the day I depend on network programming. In that way, we are collaborators. Just as I want the network to be successful, my network wants me to run good stations.

But at the same time, we're also business competitors. I periodically sit across the table from network executives and negotiate affiliation agreements. These are tough, long, important negotiations. The competition is not just at contract negotiation time, however. The competitive tension between the networks and affiliates is present every day. That competitive tension is understandable because the business goal of the network is different from the goal of a local station operator. CBS has one goal: to make certain that 100% of their programming is carried by CBS affiliated stations and to achieve high ratings for that programming. One hundred percent clearance of a program helps generate higher ratings. It also helps CBS if it owns a stake in the program. And it helps when it sells time to national advertisers. The tension lies between the network's business objective, maximum exposure, and my business -- and legal -- objective, to meet the needs of the community I serve. In Detroit, we preempt network programming to carry the local Thanksgiving Day parade. In Houston, we preempt network programming for rodeo coverage and for the Muscular Dystrophy telethon. In Jacksonville, Orlando and Miami we preempt hours of network programming to carry the Children's Miracle Network. In the Carolinas, carrying ACC basketball is popular, and some of those games occur during prime time. For some Mississippi stations, the Billy Graham Special a couple times a year gets a big audience. In Montana, the state high school sports finals generate lots of viewers. These programs reflect local interests, local concerns, and local needs.

Whatever the reason -- and yes, the reason can be that another program is more popular and thus more remunerative -- a local broadcaster makes a decision not to carry the network feed. Local broadcasters make these decisions not because they want to harm the network but because they seek to meet the unique needs of their community. (A local broadcaster should not have to prove they lost money to justify a preemption; indeed, getting a big audience is in many ways the best vindication that it was a "good" preemption.) The competitive tension that I describe here has always been part of our business, but in recent years the pressure not to preempt network programming has grown intense and has been reflected in affiliation agreement provisions that are too restrictive. Clearances of network programs are up; affiliate preemptions are down. Affiliates are being "muscled" to carry network shows that they otherwise would not choose to air and their role as a disciplining force to the networks is being diminished. Their voices against unsuitable network material have become muted. Their suggestions for improving network news and other shows grow fewer and fainter.

These trends have increased dramatically since the cap was raised to 35% and have adverse consequences for the quality of the public's broadcast service (whether the viewer is served over-the-air, or by cable or satellite). If the ownership cap is relaxed further, one of two consequences will result. First, if the networks buy lots of stations then the general manager of an O&O in Raleigh or Columbia or Jackson or Decatur who has to make the decision of whether to run a local basketball game or Children's Miracle Network telethon or a special will be answering to Mel Karmizan. Trust me: no G.M. working for Mel will want to call him saying that they won't be showing his network program to carry a high school basketball game. Alternatively, as the networks buy up more and more stations and network power increases, the number of independent voices will dwindle and if my station remains independently owned, it will become more difficult to speak out without the fear of repercussions from the network.

As this analysis makes clear, increasing the ownership cap would harm the vitally important relationship between broadcast networks and their affiliates. We're not alone in this view. The FCC reported last year that raising the ownership cap would "increase the bargaining power of networks over their affiliates, reduce the number of viewpoints expressed nationally, increase concentration in the national advertising market, and enlarge the potential for monopsony power in the program production market."[6] Because of further consolidation, that statement is truer today than it was twelve months ago.

(2) Syndicated programming. With regard to syndicated programming, both Congress and the FCC have recognized that the state of competition in that market has a direct impact on whether to repeal or modify the broadcast cap. On the supply side, repeal of the fin/syn rule has allowed networks to purchase major syndicators or develop their own syndication divisions, thereby taking control over a greater proportion of non-network program hours. As a result, the number of syndicators that control significant amounts of content has declined—from dozens in 1996 to a handful today—and most of those that remain are tied to the networks.[7] In addition, on the demand side, further nationwide consolidation of station ownership will mean that there are fewer viable purchasers for syndicated programming aside

---

6 *Biennial Review Report,* at ¶ 26 n.78 (Excerpts in Attachment 2).

7 *See* David Hatch, *Independents Fight the Good Fight*, ELECTRONIC MEDIA (Jan. 29, 2001) at 1.

from the dominant national networks. Repeal or relaxation of the national broadcast cap would thus exacerbate both supply-side and demand-side concentration in the syndication market.

(3) Advertising. With regard to the advertising market, the FCC concluded recently that an expansion of the 35% cap would harm competition by "increas[ing] concentration in the national advertising market."[8] In the current marketplace, independent advertising sales representatives serve as intermediaries between local stations and national advertisers. These "reps" are capable of assembling enough independently owned affiliates and other local stations to compete with the networks as sellers on the regional or national spot advertising market.[9] Because O&Os do not sell advertising in competition with the networks that own them, the national broadcast reach cap is essential to protecting the ability of affiliated stations to maintain healthy competition in these markets.

****

In sum, though the world of television has changed substantially, the need for safeguards has not. In fact, it has increased. Though over-the-air television does not hold the position it once held in American society, its impact still looms large. Whether it's local weather or news or candidate forums or sports or charity events, local broadcasters remain a trusted source of information. And for those Americans who don't subscribe to pay-TV service, local broadcasters are the sole source of news and programming. So though it is easy for the networks to say that these ownership rules don't make sense in Internet time, the truth is that the values of localism and diversity endure and are as much in need of protection today as they were years ago. And the power and proclivity of the networks to override them are greater.

---

8 *Biennial Review Report,* at ¶ 26 n.78 (Excerpts in Attachment 2).

9 *See generally Review of the Commission's Regulations Governing Broadcast Television Advertising, Notice of Proposed Rulemaking*, 10 FCC Rcd 11,853 (June 14, 1995).

III. The National Television Ownership Cap Promotes Diversity And Localism.

The foundation of the Communications Act of 1934, and every amendment since then, is that a person who holds a spectrum license is obligated to use the nation's airwaves to serve the public and to maintain control of the station's operations. Since its inception, the FCC has applied special rules to the nation's broadcast system with one overriding goal in view: service to the public. Central to that goal is the principle that the local licensee must be free to choose the appropriate mix of programming for the community it serves. As Congress has recognized, the balanced system of national networks and local affiliates has "served the country well" by combining the "efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public."[10] To further the public interest, broadcasters of free, over-the-air television have long been charged with serving the diverse needs of local communities, for example by providing programming that is responsive to the issues facing those communities and affording equal opportunities and reasonable access to candidates for public office.[11]

---

[10] H.R. Rep. No. 100-887, pt. 2, at 20 (1988). *See also Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("Congress designed this system of allocation to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern.").

[11] *See In re Review of the Commission's Regulations Governing Television Broadcast, Further Notice of Proposed Rulemaking*, 10 FCC Rcd 3524 at ¶ 66 (1995). Notwithstanding competition from cable, DBS, and the Internet, broadcast television remains the dominant medium for video programming. In 2000, network affiliates and other broadcast stations accounted for some 60% of television viewership nationwide. *See Seventh Annual Report, In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, at ¶ 22 (Jan. 8, 2001). In a recent ratings period, only two of the 100 top-rated prime-time shows were cable programs, rather than broadcast. *See* TVB Press Release, *Broadcast Television Continues Lead Over Cable Through March* (April 18, 2001).

One of the most effective ways to protect viewpoint diversity is to safeguard the important partnership between broadcast networks and their affiliates. The ownership cap is a vital way to ensure the delicate balance in the network-affiliate relationship is maintained. For example, a network-affiliated broadcaster must have the freedom to respond effectively and comprehensively to its community by interspersing programming responsive to its local community with the national programming provided by the network. Even with the cap at 35%, the affiliates' freedom is in jeopardy. The FCC, which has studied the industry closely, agrees. The Commission stated in its *Biennial Review Report*:

> The national networks have a strong economic interest in clearing all network programming, and we believe that independently owned affiliates play a valuable counterbalancing role because they have the right to decide whether to clear network programming or to air instead programming from other sources that they believe better serves the needs and interests of the local communities to which they are licensed.

Biennial Review Report, at ¶ 30 (Excerpts in Attachment 2).

The bargaining power of the networks has *increased* dramatically since 1996. For example, the current network affiliation agreements typically provide that a network affiliate risks loss of affiliation and other serious penalties if it "preempts" more than a few hours of network programming over an entire year without the network's approval.[12] This shift in the balance of power threatens the ability of consumers to view local programming that meets community needs. Concern about this overreaching led the affiliates to ask the FCC to rule that the networks' new practices are inconsistent with existing Commission rules and the Communications Act, and should stop immediately. We have submitted substantial evidence to the FCC on this issue, but let me share with the Committee one well-publicized example. Last

---

[12] Affiliate agreements must be filed with the Commission pursuant to 47 C.F.R. § 73.3613(a).

fall NBC told its affiliates to air Game One of the American League Division Series rather than the first of the 2000 presidential debates.[13] Ultimately, after hearing repeatedly from the NBC Television Affiliates Association, the network relented and allowed affiliates to preempt the baseball game for the debate. Fox, meanwhile, insisted that its affiliates air the sci-fi series "Dark Angel" instead of the debate, and Fox did not back off. Allowing the networks to own more stations means that this tendency to hew strictly to the network programming line-up will be spread among more stations and will affect more communities and viewers.

Two networks—Fox and CBS—already exceed the 35% reach cap; indeed, if the "UHF discount" is disregarded, each of these networks already has an audience reach of close to 50%.[14] By owning more stations, especially in major markets, the networks directly control the distribution of information to an increasing percentage of the American public, who as a result forego the benefits local licensee judgment traditionally exercised by the independently owned network affiliates. Network O&Os, for sound business reasons, rarely preempt network programming for local programming of greater interest to their local communities. Even when airing a program of local interest would be more economically beneficial to the local licensee than clearing network-owned programming, the networks have a strong incentive to broadcast their own programs via all of their O&Os and affiliates, for two reasons. Their ability to sell nationwide advertising time depends on their ability to garner high ratings; and also, as the networks continue to purchase or develop their own syndication operations, nationwide clearance increases the national "aftermarket" value of their programs. Non-network-owned stations, by

---

13 *See* Michael Carney, "NBC's Swing Vote: Network To Skip Debate For Baseball," WASHINGTON POST, Sep. 23, 2000, at C1. Fox insisted that its affiliates air the sci-fi series "Dark Angel" instead of the debate.

14 *See* "Sly Fox buys big, gets back on top," BROADCASTING & CABLE, Apr. 23, 2001, at 60. Under the Commission's rules, the audience reach of an UHF station in calculating the national ownership cap is reduced by half, due to the traditional weaker coverage of an UHF signal.

contrast, are not similarly constrained because their sole interest is in how well the programs perform in the local community.

The result of all of these changes in the market is two-fold. First, the more stations that the networks own, the more you'll see the nationalization or homogenization of programming. The networks have a strong business incentive to deliver a national feed all the time. Nationalization of our broadcasting system sets back the cause of localism and diversity. Second, as I explained above, the affiliates are at risk of losing power to stand up to the networks, to informally ride herd on issues of suitability and taste in programming. We may not always succeed, and you may not agree with our judgment, but I'll tell you that a critical part of the job of the affiliate boards is to carry complaints about programming and how it is promoted to the networks. The result is a healthy debate on what is good television. That beneficial influence would be lost if the affiliates become, as Congress feared, mere "passive conduits for network transmissions from New York."[15]

Let me emphasize that I think Mel and the other networks generally run good local stations. The question is not whether I'm a better broadcaster than he is. The question is whether we as a society are better off having three or four people making those decisions from New York or Hollywood, or dozens and dozens.

IV. The Television Ownership Cap Set By Congress Is Constitutional.

Contrary to the contention of the networks, the recent decision in *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner II*") does not

---

[15] H. R. Rep. No. 104-204 at 221 (1995).

affect the validity of the 35% national broadcast ownership cap. In the first place, the same court had already held that a cable ownership cap was constitutional and that the FCC was empowered to establish a cap. Instead, the problem was the lack of justification for the 30% cap that it selected.

In contrast to the horizontal cable rule addressed by the court in *Time Warner II,* the 35% ownership cap was set by Congress. The statutory backdrop to the horizontal cable rule could scarcely have been more different from the one at issue here. In the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("Cable Act"), which authorized the rulemaking at issue in *Time Warner II,* Congress delegated to the Commission the authority to set "limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest." 47 U.S.C. § 533(f)(1)(A). Moreover, Congress declared that in setting such limits the Commission must "ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer." *Id.* § 533(f)(2)(A).[16]

Acting pursuant to this delegated authority, the Commission set a 30% limit on the number of subscribers that may be served by a single cable operator, justifying this limit in part by pointing to the risk that several cable operators might independently deny carriage to a given programmer. A 30% cap would ensure the presence of at least four cable operators in the marketplace, the Commission reasoned, reducing this risk and increasing the diversity of media

[16] In addition, Congress in the 1992 Cable Act expressly required the Commission to "account for any efficiencies and other benefits that might be gained through increased ownership or control." *Id.* § 533(f)(2)(d). The 1996 Act contains no equivalent requirement.

voices available to the public. *Time Warner II*, 240 F.3d at 1134. In *Time Warner II*, the court concluded that the Commission was not authorized to protect diversity by taking into account the potential for non-collusive action by multiple cable operators, because Congress in the Cable Act had given the Commission a more limited mandate. *Id.* at 1135-36.

By contrast, Congress established the 35% national television ownership cap by statute. The Commission's authority to regulate broadcast station ownership in the interests of diversity and localism is clear. Moreover, the 35% rule does not abridge any speaker's First Amendment rights. Unlike the cable must-carry rules legislated in the 1992 Cable Act, it is a restriction on ownership, not a restriction on (or a compulsion of) speech. The networks have tried to claim that as a result of the ownership cap, they are barred from speaking to 65% of the potential television audience nationwide. That is not the case. Apart from the fact that broadcast networks are free to own cable programming networks (as all the networks do) and radio stations, each of the networks operates a national broadcast television network. Through their O&Os and their affiliates, NBC, CBS, and ABC now reach over 98% of all television households (a figure that approaches 100% when their owned cable and satellite networks are added to the equation) and Fox reaches well over 90%. A rule change allowing them to own additional stations would not enable them to speak to a single viewer they cannot reach now.

We agree with the conclusion that many members of this Committee communicated to Chairman Powell on this question:

> In writing the Telecommunications Act of 1996, Congress itself set the national television ownership cap and incorporated it in the statute for the same reasons the court [in the *Time Warner* case] found to be important governmental interests in the recent litigation addressing the cable ownership cap: to promote diversity in ideas and speech and preserve competition.[17]

---

[17] Letter to Chairman Michael Powell, at 2 (Attachment 1).

NASA, joined by the NAB, has vigorously defended the constitutionality of the ownership cap before the D.C. Circuit in a suit filed by the networks. Given the statements by the court in both *Time Warner* decisions, we're confident that we'll prevail. However, I suspect that regardless of how the court decides this issue may be back before the Committee.

****

My company and all the members of NASA are in the broadcast business because we want to be local broadcasters. We want to be partners with the networks; I want them to succeed and I hope they want me to succeed. We want them to offer quality programming but ultimately we want the ability to carry out our legal mandate to make decisions about what works best for each of our communities. Increasing or repealing the national ownership cap puts at risk our system of diversity and localism. As demonstrated above, all of the networks' arguments for altering the ownership cap lack merit. For the sake of the public interest and the health of the American system of broadcasting, we strongly urge this Committee to preserve and affirm the national television ownership cap.

ATTACHMENT 1

Congress of the United States
Washington, DC 20515

June 29, 2001

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Powell:

We oppose any effort to increase the national broadcast ownership cap. Two of the hallmark principles of the Communications Act are localism and diversity, and our uniquely American form of broadcasting, with its combination of national networks and local, independently-owned and -operated broadcast outlets, reflects these core principles. We are committed to making sure that as the media industry evolves and consolidates, the voice of local broadcasters is not stifled or silenced. The national ownership cap at its current level serves a critical role in preserving localism.

We believe that the 35 percent cap should remain where Congress established it in the law, and we write to urge the Commission not to increase the cap and to vigorously defend this provision as it comes under fire before the Commission and in the courts. We believe that the voice of the local station will become ever more meaningful to our communities, especially for that segment of the population that does not subscribe to pay television, as the broadcast television industry transitions to digital technology and its ability to serve local communities is enhanced. It is for this reason that we oppose any increase in the current 35 percent national television ownership cap that Congress adopted, after lengthy debate on the floor of both the House and Senate, as part of the Telecommunications Act of 1996.

Challenges brought by the broadcast television networks against the national television ownership cap lack merit and we believe the Commission has an obligation to vigorously defend the cap against such challenges. In our view, the D.C. Circuit's recent holdings in litigation surrounding cable ownership caps simply establish that (1) Congress acted constitutionally when it set limits on ownership of media properties in order to preserve competition and promote diversity in ideas and speech; and (2) the FCC did not adequately justify the particular numerical limitation it set on cable networks in its rule. The D.C. Circuit did not find that the Commission could not promulgate limitations with regard to media ownership. In writing the Telecommunications Act of 1996, Congress itself set the national television ownership cap and incorporated it in the statute for the same reasons the court found to be important governmental interests in the recent litigation addressing the cable ownership cap: to promote diversity in ideas and speech and preserve competition.

Moreover, the time is not right for a change in the national ownership cap. In recent years the Commission has altered a number of rules affecting the broadcast industry, from the dual network rule to the duopoly rule to the financial interest and syndication rule. Because these rules are related and interact in their impact on local broadcasting, the Commission should take sufficient time to observe the effects of those recent changes and assess their impact on diversity and competition before considering any alteration to the national limit.

The national ownership cap is vital to ensuring that television programming decisions remain in the hands of local broadcasters, and that media power does not become concentrated in New York or Los Angeles. The national broadcast ownership cap is not, as some wrongly suggest, just about competition. Local input helps keep our broadcast system responsive to the views of local communities across the country. That diversity of viewpoint benefits our democracy. The national ownership cap also ensures that the delicate balance of power in the network-affiliate partnership is maintained. We think that recent controversy regarding the scope of the networks' power even under the current regulatory regime underscores the notion that retention of the 35% national television ownership cap remains essential to prevent potential abuses.

We urge the Commission to honor its statutory responsibility to facilitate a robust system of locally-based broadcasting not equaled anywhere in the world by maintaining and enforcing the law as established by Congress. Thank you for your time and attention to this matter.

Sincerely,

Edward J. Markey

Trent Lott

Byron L. Dorgan

Conrad Burns

Max Cleland

Jesse Helms

John Edwards

Barbara Boxer

cc: Commissioner Gloria Tristani
Commissioner Kathleen Abernathy
Commissioner Michael Copps

ATTACHMENT 2

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996.	))))	MM Docket No. 98-35

BIENNIAL REVIEW REPORT

By the Commission: Chairman Kennard and Commissioner Ness issuing separate statements; Commissioners Furchtgott-Roth and Powell concurring in part, dissenting in part, and issuing separate statements; Commissioner Tristani approving in part, dissenting in part and issuing a statement.

Adopted: May 26, 2000 Released: June 20, 2000

TABLE OF CONTENTS

I. INTRODUCTION

1. This Report reviews our broadcast ownership rules as required by Section 202(h) of the Telecommunications Act of 1996 ("Telecom Act").[1] That section provides:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[2]

More recently, Congress has prescribed a period of 180 days from November 29, 1999, in which the Commission is to complete the 1998 biennial review of its broadcast ownership rules.[3] The Conference Report for this 1999 Act states that within the subject period the Commission shall issue a report and if it concludes that it should retain any of the rules unchanged, it "shall issue a report that includes a full justification of the basis for so finding."[4]

2. Six rules are reviewed in this Report: (1) the national TV ownership rule (including the "UHF discount"); (2) the local radio ownership rules; (3) the dual network rule; (4) the daily newspaper/broadcast cross-ownership rule; (5) the cable/television

---

1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The context of Section 202(h) of the Telecom Act makes clear that the scope of the required ownership review relates to the Commission's broadcast ownership rules, both those adopted under Section 202 and our other broadcast ownership rules. In this regard, we note that Section 202 is entitled "Broadcast Ownership," as is the corresponding section of the Conference Report. House Rep. 104-458, 104th Cong., 2d Sess. 161 (1996). Also required by Section 202(h) is the biennial review of rules adopted pursuant to Sections 202(a)-(f) of the Telecom Act. These include rules pertaining to cable as well as broadcast cross-ownership.

2 Section 11(a) of the Communications Act of 1934, as amended, similarly provides that under the statutorily required review, the Commission "shall determine whether any such regulation is no longer necessary in the public interest as a result of meaningful economic competition" and requires that the Commission "shall repeal or modify any regulation it determines to be no longer necessary in the public interest." 47 USC § 161.

3 Section 5003, Pub L. 106-113, 113 Stat. 1501 (1999), Making consolidated appropriations for the fiscal year ending September 30, 2000, and for other purposes.

4 Joint Explanatory Statement of the Committee of Conference on the "Intellectual Property and Communications Omnibus Reform Act of 1999," at 59.

cross-ownership rule; and (6) an experimental broadcast station ownership rule. The Report provides a regulatory history of each rule, followed by a discussion of the competitive and diversity issues that justify our decision as to whether the rule remains in the public interest.

3. On March 12, 1998, we adopted a Notice of Inquiry ("NOI")[5] in this proceeding seeking comment on the six rules included in this biennial ownership report. The NOI did not seek comment on the local television ownership rule or one-to-a-market ownership rule because these rules were already the subject of pending proceedings and we reasoned that their examination in those proceedings complied with Congress' mandate that we review all of our ownership rules biennially beginning in 1998.[6] On August 5, 1999, we adopted a Report and Order[7] relaxing our local television ownership rule and one-to-a-market ownership rule. Those decisions provided broadcasters with expanded opportunities to realize the efficiencies of television duopolies and local radio/television combinations in markets where an essential level of competition and diversity would be preserved. More specifically, we narrowed the geographic scope of the television duopoly rule from the Grade B contour approach to a "DMA" test. This new approach allows the common ownership of two television stations without regard to contour overlap if the stations are in separate Nielsen Designated Market Areas ("DMAs"). Additionally, it allows the common ownership of two television stations in the same DMA if their Grade B contours do not overlap or if eight independently owned, full-power and operational television stations will remain post merger, and one of the stations is not among the top four ranked stations in the market based on audience share. Furthermore, we adopted waiver criteria presuming, under certain circumstances, that a waiver to allow common local television station ownership is in the public interest where one of the stations is a "failed station," is a "failing station," or where the applicants can show that the combination will result in the construction and operation of an authorized but as yet "unbuilt" station. We also substantially relaxed the radio/television cross-ownership ("one-to-a-market") rule to permit more such combinations, including allowing a party to own as many as one TV station and seven radio stations under certain circumstances. These actions were taken in fulfillment of our obligations under Section 202(h) of the Telecom Act and satisfy its requirements as to the subject rules.[8]

---

5 Notice of Inquiry, 13 FCC Rcd 11276 (1998) ("NOI").

6 NOI, supra at 11279-80.

7 Report and Order in MM Docket Nos. 91-221 & 87-8, 14 FCC Rcd 12903 (1999) (hereinafter "TV Ownership Order").

8 The Conference Report accompanying the Telecom Act, states that the, "conferees are aware that the Commission already has several broadcast deregulation proceedings underway. It is the intention of

4. In the instant phase of our biennial review of broadcast ownership rules, we conclude that the local radio ownership rules, the national television ownership rule (including the UHF discount), and cable/TV cross-ownership rule continue to serve the public interest and so retain these rules. As noted above, we have just recently substantially relaxed our local television ownership and one-to-a-market rules. It is currently too soon to tell what effect this will have on consolidation, competition and diversity. Until we have further information in this regard we believe that these rules remain necessary in the public interest in their current form. However, we will issue Notices of Proposed Rule Making proposing modification of the dual network and newspaper/broadcast cross-ownership rules. Additionally, in the case of the local radio ownership rule, we will issue a Notice seeking comment on alternative methods of correcting certain anomalies in the way we currently define radio markets and the way we count the number of stations in a radio market and the number of radio stations that an entity owns in a market. Finally, we conclude that the experimental broadcast station multiple ownership rule may no longer be in the public interest and will issue a Notice of Proposed Rule Making proposing its elimination.

II. BACKGROUND

5. For more than a half century, the Commission's regulation of broadcast service has been guided by the goals of promoting competition and diversity.[9] These goals are separate and distinct, yet also related. Indeed, as recently as 1997, the Supreme Court noted that "[f]ederal policy . . . has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation."[10] The Supreme Court has also held that both of these goals are important and substantial public policies for First Amendment purposes.[11] Competition is an important part of the Commission's public interest mandate, because it promotes consumer welfare and the efficient use of

the conferees that the Commission continue with these proceedings and conclude them in a timely manner." H.R. Rep. 104-458, at 164.

9 For a more extensive discussion of the Commission's competition and diversity goals see TV Ownership Order, supra at 12910-12924.

10 Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 117 S.Ct. 1174 (1997)("Turner II"). (Citations omitted.)

11 Turner Broadcasting System v. FCC, 512 U.S. 622, 662 (1997)("Turner I").

resources and is a necessary component of diversity.[12] Diversity of ownership fosters diversity of viewpoints, and thus advances core First Amendment principles. As the Supreme Court has said, the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ."[13] Promoting diversity in the number of separately owned outlets has contributed to our goal of viewpoint diversity by assuring that the programming and views available to the public are disseminated by a wide variety of speakers.

6. This Report uses the framework for reviewing competition and diversity outlined in the NOI to evaluate, as required by the Telecom Act, whether the six rules included in this biennial review continue to be in the public interest.[14] Thus, we assess current levels of competition in the market for delivered video programming, the advertising market, and the program production market to determine whether such competition has eliminated the need for the six rules. Our diversity analysis focuses upon the degree to which broadcast and non-broadcast media, operating within the framework of our ownership rules, advance the three types of diversity (i.e., viewpoint, outlet and source) that our broadcast ownership rules have attempted to foster. Viewpoint diversity refers to the range of diverse and antagonistic opinions and interpretations presented by the media. Outlet diversity refers to a variety of delivery services (e.g., broadcast stations, cable and DBS) that select and present programming directly to the public. Source diversity refers to the variety of program or information producers and owners.[15]

III. STATUS OF MEDIA MARKETPLACE

7. Our decision here concerning the broadcast ownership rules takes account of the ongoing changes in the structure of the broadcast industry. The UHF television discount, the daily newspaper/broadcast cross-ownership rule, the cable/television cross-ownership rule, and the experimental broadcast station ownership rule have not been examined for many years. In reviewing these rules, we recognize that there has been

12 Revision of Radio Rules and Policies, 7 FCC Rcd 2755 (1992), recon. granted in part, 7 FCC Rcd 6387 (1992), further recon., 9 FCC Rcd 7183 (1994).

13 Associated Press v. United States, 326 U.S. 1, 20 (1945); accord Federal Communications Commission v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

14 NOI, supra at 11277-78.

15 See TV Ownership Order, supra at 12911-12, n.29; see also TV Ownership Further Notice, 10 FCC Rcd 3524, 3549-50 (1995).

substantial growth in the number and variety of media outlets in local markets. In contrast, the national television ownership rule, the local radio ownership rules, and the dual network rule were modified in 1996 in accordance with Section 202 of the Telecom Act. While there has been growth in the number and variety of media outlets since the Telecom Act, there have also been significant changes in the ownership structure of the broadcast industry during that period, chiefly consisting of extensive consolidation in the radio and television industries.

8. Section 202(h) of the Telecom Act requires us to determine whether any of our broadcast ownership rules "are necessary in the public interest as the result of competition." We note that some commenters express the belief that this limits our review only to competitive matters and that our analysis must be devoid of diversity considerations. Because the statutory language requires reference to the public interest standard, and because diversity and competition have both been critical components of that standard,[16] our review must consider diversity issues as well. Indeed, the United States Supreme court has identified as a "governmental purpose of the highest order" ensuring the public's access to "a multiplicity of information sources."[17] Also, there is support for our consideration of diversity in this context in the legislative history of the Telecom Act itself. As discussed in our recent local television ownership decision,[18] Congress expressed diversity concerns with regard to at least two of our rules and, with respect to our review of the radio/television cross-ownership rule, expressly instructed the Commission to take into account not only the increased competition facing broadcasters but also "the need for diversity in today's radio marketplace."[19] Finally in this regard, the statutory language appears to focus on whether the public interest basis for the rule has changed as a result of competition, and does not appear to be intended to limit the factors we should consider. Therefore, our public interest determination for each rule is based on an examination of both competition and diversity issues in light of competitive market conditions. The material below provides a brief overview of the number of outlets, ownership structure, and other information relevant to the current status of competition in the video, audio, and newspaper industries. The numbers alone, of course, are not sufficient to determine whether particular media compete with one another in relevant markets or whether different media are adequate substitutes for one another from a diversity perspective.

---

[16] See, e.g., United States v. Storer Broadcasting Company, 351 U.S. 192, 203 (1956); FCC v. National Citizens Committee For Broadcasting, 346 U.S. 775, 780-81,794 (1978).

[17] Turner II, supra at 190.

[18] TV Ownership Order, supra at 12913.

[19] S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 163 (1996).

9. Video. There are currently over 100 million TV households in the U.S.[20] served by a variety of video outlets. Over-the-air outlets include: 1,243 commercial TV stations (682 UHF, 561 VHF); 373 non-commercial, educational TV stations (248 UHF, 125 VHF); and, over 2,100 low-power TV stations.[21] Sixty percent of commercial TV stations are affiliated with one of the top four networks (ABC, CBS, Fox, & NBC). Another 18 percent are affiliated with the newer national networks: United Paramount (UPN), Warner Brothers (WB) and the Paxson Network (Paxnet).[22] The remaining commercial stations are affiliated with smaller networks or are independents. The average TV household in the U.S. can receive 13 over-the-air TV stations, while 36 percent of all homes can receive 15 or more stations and 9 percent can receive 20 or more stations over the air.[23]

10. There are over 10,400 cable systems passing 96+ million homes and serving almost 67 million TV households.[24] This represents sixty-six percent cable penetration.[25] Sixty-four percent of all subscribers have at least 54 channels and over 98% have a minimum of 30 channels.[26] Today there are over 170 national cable programming networks and 50 regional networks.[27] Many cable systems offer PEG access channels, and some, albeit fewer than a dozen, offer local cable news, educational and public affairs programming. Most, if not all, of these latter type of channels are owned by a local television station or newspaper.

---

20 U.S. Television Household Estimates, Nielsen Media Research, September 1999.

21 FCC Press Release, Broadcast Station Totals as of September 30, 1999, (issued November 22, 1999).

22 BIA Research Inc., MEDIA Access Pro Data Base, May 22, 2000.

23 Nielsen Media Research, Television Audience 1996, 1997.

24 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket 99-230, ("Sixth Cable Report"), 15 FCC Rcd 978, Appendix B (2000).

25 Broadcasting & Cable, April 24, 2000, at 62.

26 Id. at Table B-4.

27 NCTA, Cable Television developments, Fall 1998/Winter 1999, at 28-136.

11. Other video providers include Direct Broadcast Satellite (DBS), which currently provides up to 350 channels to over 10 million subscribers. Multichannel Multipoint Distribution Service (MMDS) serves over 800,000 subscribers; Satellite Master Antenna Television (SMATV) has approximately 1.5 million subscribers; Home Satellite Dishes (HSD) serve over 1.7 million households; Open Video Systems (OVS) have 60 thousand subscribers.[28] By 1999, fifty percent of households owned a PC and over 100 million Americans were Internet users.[29]

12. Audio. Over 12,600 radio stations are currently on the air (4,783 AM, 5,766 commercial FM and 2,066 educational FM).[30] The average radio market has 22 commercial radio stations. Of 270 Arbitron radio markets, 128 markets (47 percent) are served by more than 20 stations and 90 percent of markets (244 of 270) have over 10 stations.[31]

13. Newspapers. In 1998, there were 1,489 daily newspapers in the U.S. The total circulation for those dailies was about 56 million.[32] There were also 8,193 weekly newspapers with a combined circulation of over 74 million, and a Sunday circulation of over 60 million.[33] There are also a number of special interest newspapers available to readers, catering to a wide variety of audiences. There are 185 African-American newspapers in 35 states and the District of Columbia, 107 Hispanic newspapers published in 35 states and the District of Columbia, 98 Jewish newspapers in 31 states, 159 other "ethnic" newspapers published in the U.S., 43 gay and lesbian newspapers published in 24 states and the District of Columbia, 134 military newspapers published in 38 states, 132 religious newspapers published in 40 states and the District of Columbia, and 1,236 college newspapers published in all 50 states and the District of Columbia.[34] Many of

28 Sixth Cable Report, supra at Table C-1.

29 Id. at p.8.

30 FCC Press Release, Broadcast Station Totals as of September. 30. 1999, (issued November 22, 1999).

31 These station counts include all in-market stations and selected out-of-market stations based on BIA's "Investing in Radio," 1999 Market Report, 4th Edition.

32 Newspaper Association of America, Facts About Newspapers 1999, at 15.

33 Id. at 16, 27, 31.

34 Editor and Publisher Yearbook 1998, at II-1 to II 124.

these newspapers, however are not published daily, are not in the English language, and are not circulated generally in the community of publication, or have insufficient circulation in the DMA.

IV. RULES

A. National TV Ownership Rule and UHF Discount

1. Regulatory History

14. Section 73.3555(e)(1) sets forth the current national TV ownership rule. That section states:

> No license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer, or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in TV stations which have an aggregate national audience reach exceeding thirty-five (35) percent.[35]

15. Section 73.3555(e)(2) sets forth the "UHF discount." That section explains that "national audience reach" is based on the number of TV households in Nielsen Designated Market Areas (DMA), and that UHF TV stations are attributed with only 50% of the TV households in the DMA.[36]

16. The Commission first adopted a national ownership limit for television broadcast stations in the 1940s by imposing numerical caps on the number of stations that could be commonly owned, and originally limited common ownership to no more than three stations nationwide.[37] Several years later this was expanded to allow ownership of no more than five stations.[38] In retaining the five station rule in 1953, the Commission

---

[35] 47 C.F.R. § 73.3555(e)(1).

[36] 47 C.F.R. § 73.3555(e)(2). The UHF discount is intended to recognize the deficiencies in over-the-air UHF reception vis-a-vis VHF reception. As a result, UHF stations are not "credited" with reaching their entire market but, instead, their coverage is "discounted" by 50 percent.

[37] 6 FR 2284-85 (Tuesday, May 6, 1941).

[38] 9 FR 5442 (Tuesday, May 23, 1944).

explained:

> The purpose of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoint as well as to prevent any undue concentration of economic power contrary to the public interest and thus to carry out the underlying purpose of the Communications Act to effectuate the policy against monopolization of broadcast facilities and the preservation of the broadcasting system on a free competitive basis.[39]

17. In 1954, the Commission adopted the "Seven Station Rule" by raising the multiple ownership limit from five stations to seven, with no more than five being VHF stations.[40] The Commission believed that the more rapid and effective development of the UHF band warranted permitting the ownership of additional UHF stations.[41] The Commission noted that it was aware of the serious problems confronting the development of the UHF service, especially in markets with VHF-only set saturation, and that it was in these areas particularly where the prestige, capital, and know-how of the networks and other multiple owners would be most effective in aiding UHF.[42]

18. Thirty years later, in 1984, the Commission eliminated the Seven Station Rule and established a six-year transitional period during which common ownership of twelve television broadcast stations would be permitted.[43] The Commission determined that repeal of the Seven Station Rule would not adversely affect the Commission's traditional policy objectives of promoting viewpoint diversity and preventing economic concentration.[44] The Commission explained that: 1) changes in the broadcasting and

---

[39] Amendment of Multiple Ownership Rules, 9 RR 1563 (1953). See Federal Communications Commission v. Sanders Brothers Radio Stations, 309 U.S. 470 (1940).

[40] Amendment of Multiple Ownership Rules, 43 FCC 2797 (1954).

[41] Id. at 2801.

[42] Id.

[43] Amendment of Multiple Ownership Rules, (Gen. Docket 83-1009) 100 FCC 2d 17 (1984).

[44] See id. at 24-46 for a discussion of the effects of eliminating the rule on viewpoint diversity and economic competition.

communications markets,[45] 2) new evidence of the positive effects of group ownership on the quality and quantity of public affairs and other programming responsive to community needs,[46] and 3) the lack of relevance of a national ownership rule to the availability of diverse and independently owned radio and TV voices to individual consumers in their respective local markets[47] led to the conclusion that the rule was unnecessary to ensure diversity of viewpoints.[48] The Commission determined that the better focus for addressing viewpoint diversity and economic competition concerns was the number and variety of information and advertising outlets in local markets.[49] Nevertheless, the Commission recognized the concerns of some commenters that, if the rule were repealed immediately and in its entirety, a significant restructuring of the broadcast industry might occur before all ramifications of such a change became apparent. Therefore, the Commission established a transitional limit of twelve television broadcast stations.[50] The transitional limit would automatically sunset in six years unless experience showed that continued Commission involvement was warranted.

19. On reconsideration, the Commission, modified its decision.[51] Specifically, the Commission 1) established an audience reach cap of 25 percent,[52] in addition to the

[45] Id. at 18, 28.

[46] Id. at 20.

[47] Id. at 37.

[48] Id. at 19.

[49] Id. at 20. Regarding the possibility of competitive harm, the Commission noted the conclusions of the Department of Justice that "elimination of the Seven Station Rule will raise little risk of adverse competitive effects in any market." The Department concluded that elimination of the rule would not increase concentration in the national network advertising market, because each network has already achieved access to almost every local market through its affiliation agreements. In the local spot market, the Department concluded that "[s]ince spot advertising is sold in local geographic markets, and the rule does not address concentration in those markets, a rule change should not affect competition in spot advertising." Id. at 38, 41. The Commission also noted that elimination of the rule may allow group owned television stations to exploit important efficiencies. Id. at 44.

[50] Id. at 18, 55.

[51] Memorandum Opinion and Order in MM Docket No. 83-1009, 100 FCC 2d 74 (1985).

[52] Defined as 25 percent of the national audience, calculated as a percentage of all Arbitron ADI television households.

twelve station limit, to better account for the effect that relaxation of the rule would have on population penetration; 2) attributed owners of UHF stations with only 50 percent of their ADI audience reach to take cognizance of the limitations inherent in UHF broadcasting; 3) permitted common ownership of an additional two television stations, provided that they were minority controlled; and 4) eliminated the automatic sunset provision. The stated objective was to permit reasonable expansion so as to capture the benefits of group ownership while avoiding the possibility of potential disruptive restructuring of the national broadcast industry.[53] The Commission explained that a numerical cap would prevent the acquisition of a tremendous number of stations in the smaller markets, thus reducing the possibility of disruptive restructuring in small markets, while an audience reach cap would temper dramatic changes in the ownership structure by the largest group owners in the largest markets.[54] The Commission noted that its decision to use both a numerical cap and an audience reach cap was also predicated on concerns regarding the potential impact on industry structure.[55] The Commission further explained that attributing UHF stations with 50 percent of an ADI market's audience reach was intended to address the fundamental disadvantage of UHF television in reaching viewers.[56] The Commission found it inadvisable to terminate the multiple ownership rules for television broadcast stations automatically at the end of six years. The Commission explained that 1) it was appropriate to proceed cautiously in relaxing the rules and 2) an automatic sunset of the ownership rules was unnecessary to achieve the Commission's policy objectives.[57]

20. On March 7, 1996, the Commission amended the national television station multiple ownership rules to conform to the provisions in Section 202(c)(1) of the Telecom Act.[58] Specifically, the Commission eliminated the numerical limit on the

---

53 Memorandum Opinion and Order, (Gen. Docket 83-1009) supra at 98.

54 Id. at 89 and 91.

55 Id. at 87-88 n. 38.

56 The UHF Comparability Task Force found that: "Due to the physical nature of the UHF and VHF bands, delivery of television signals is inherently more difficult at UHF. It should be recognized that actual equality between these two services cannot be expected because the laws of physics dictate that UHF signal strength will decrease more rapidly with distance than does VHF signal strength." Id. at 93.

57 Id. at 96-97.

58 Order, 11 FCC Rcd 12374 (1996).

number of broadcast television stations a person or entity could own nationwide and increased the audience reach cap on such ownership from 25 percent to 35 percent of television households.

21. In our Notice of Inquiry in this proceeding we sought comment on this rule. Particularly, we asked about its effect on competition in the national advertising market and the program production market at the national level. We also sought comment on the rule's effect on existing television networks and the formation of new networks and sought information on the economies of scale that may have been realized as a result of the consolidation permitted by the Telecom Act.[59] Finally, we asked whether the UHF discount should be retained, modified or eliminated in view of the decreasing disparity between VHF and UHF television and, in the event of a decision to modify the rule, whether and, if so, how group owners that exceed any new limits should be grandfathered.[60]

2. Comments on National TV Ownership Rule

22. All of the major networks (ABC, CBS, Fox, and NBC) support total repeal of the national television ownership rule. These networks argue that abolition of the rule would have no effect on the level of diversity and competition in local markets,[61] and retention of the rule hinders broadcasters from achieving economic efficiencies.[62] These networks maintain that group owned stations provide more news and public affairs programming than non-group owned stations.[63] They also argue that removal of the audience reach cap would promote the development of new broadcast television networks.[64] Finally, they argue that the only two markets that may be affected by elimination of the rule, the national advertising market and the market for national

---

[59] NOI, supra at 11281.

[60] Id. at 11285.

[61] ABC Comments at 5, CBS Comments at 8, Fox and USA Broadcasting Comments at 13, and NBC Comments at 11.

[62] ABC Comments at 6, CBS Comments at 13, Fox and USA Broadcasting Comments at i-ii, and NBC Comments at 15-16.

[63] ABC Comments at 7, CBS Comments at 14-15, Fox and USA Broadcasting Comments at 16-19, NBC Comments at 15.

[64] Fox and USA Broadcasting Comments at i-ii, and NBC Comments at 14-15.

exhibition rights to video programming, would remain unconcentrated.[65]

23. Two group owners (Paxson and Council Tree) support relaxation of the rule. Paxson proposes facilitating the construction of new television stations by allowing group owners to take an equity interest in the new stations in exchange for financing the construction of new stations.[66] The ownership interest would not count for purposes of the audience reach cap. Council Tree suggests permitting group owners that have reached the 35 percent cap to take an equity interest in additional stations, as long at the stations are controlled by small businesses.[67] Again, the ownership interest would not count for purposes of the audience reach cap.

24. A number of commenters support retaining the national television ownership rule.[68] NAB argues that the new television ownership limits have not been in effect long enough to warrant any modification at this time.[69] Network Affiliated Stations Alliance (NASA) asserts that an increase in the audience reach cap will increase the bargaining power of networks and, therefore, diminish localism by making it more difficult for affiliates to program their stations in the interests of the communities they are licensed to serve.[70] Center for Media Education (CME), et al., contend that the recent increase in the cap has led to unprecedented concentration and diminished competition that may enable networks to exercise monopsony power in the program production market.[71] According to CME, et. al., the public is receiving less news and information from fewer sources.[72]

---

[65] CBS Comments at iv.

[66] Paxson Communications Corporation's Proposal to the FCC to Increase Broadcast Diversity (submitted July 24, 1998).

[67] Council Tree Communications Comments at 9.

[68] National Association of Broadcasters (NAB) Comments at 11-12; Network Affiliated Stations Alliance (NASA) at 6-15; Center for Media Education (CME), et. al. Comments at 2-17; Office of Communication, Inc., United Church of Christ, and Black Citizens for a Fair Media Comments at 4-6; American Federation of Television and Radio Artists (AFTRA) Comments at 3-6; and Gallium Communications, Inc. Comments at 2 and Reply Comments at 2-3.

[69] NAB Comments at 11.

[70] NASA Comments at 2, 5, 12 and 14.

[71] CME, et. al. Comments at 14-16.

American Federation of Television and Radio Artists (AFTRA) asserts that maintaining the existing 35 percent cap will not harm competition and is essential to protect diversity on the airwaves.[73] AFTRA argues that group owners recycle news and public affairs programming from one reporter or news writer, whereas the public interest is better served by having different reporters and news writers in separate markets provide different angles and perspective on the news.[74] One commenter wants the Commission to increase viewpoint diversity by reducing the number of stations a company may own if group owners do not spin off properties on a voluntary basis.[75]

3. Discussion of National TV Ownership Rule

25. We believe that the audience reach cap should be retained at its current level for the present. As an initial matter, Congress prescribed an increase in the cap from 25% to 35% in the Telecom Act. Several considerations motivate our decision not to change the national TV ownership rule. First, we believe that the effects of our recent change to the local television ownership rule should be observed and assessed before we make any alteration to the national limit. Second, the existing reach cap has already resulted in many group owners acquiring large numbers of stations nationwide since the cap was increased to 35 percent in 1996. We also believe that this trend needs further observation prior to any change in the cap.[76]

---

72 Id. at 16. As examples, CME, et al. point to situations in Florida and Pennsylvania where commonly owned affiliates of different networks air the same local newscasts.

73 AFTRA Comments at 3.

74 Id. at 4-5.

75 Gallium Communications, Inc. Comments at 2-3.

76 We note, however, that on November 18, 1999, Fox Television Stations, Inc., filed an "Emergency Petition for Relief and Supplemental Comments" in this proceeding seeking, among other things, repeal of the national broadcast ownership rule. Also, on November 19, 1999, Viacom Inc. filed "Comments" in this proceeding seeking repeal of the same rule and, additionally, the dual network rule. The original deadline for filing comments in this proceeding was May 22, 1998, with June 22, 1998, being the reply comment deadline. These deadlines were later extended, pursuant to the request of the National Association of Broadcasters, to July 21, 1998, and August 21, 1998, for comments and reply comments, respectively. Order in MM Docket No. 98-35, DA 98-854 (released May 7, 1998). The Fox and Viacom filings, having been submitted nearly 18 months subsequent to these deadlines will not be considered in this proceeding. Simply, to do so would provide a precedent for subjecting our biennial review proceedings to unceasing comment cycles, and would deprive other parties of an ability to respond to these new matters absent establishment of new pleading cycles. Accordingly, they will not be considered herein but will be included in the record of our 2000 biennial review of broadcast ownership issues.

26. One factor in our decision is the recent relaxation of our local television ownership rules.[77] As noted above, those decisions provided increased flexibility for the creation of television duopolies and television/radio combinations in local markets while safeguarding an essential level of competition and diversity. We conclude that prudence dictates that we should monitor the impact of our recent decisions regarding local television ownership and any impact they may have on diversity and competition prior to relaxing the national reach cap. Commenters supporting relaxation or elimination of the cap make credible arguments in favor of their position. These arguments include the contention that elimination of, or increase in, the cap would allow additional economic efficiencies and more news and public affairs, increase minority ownership by removing the cap as an impediment to broadcasters obtaining attributable equity interests in minority-owned television stations, and promote the development of new broadcast television networks. We believe, however, that the competitive concerns of opponents of relaxation or elimination of the cap[78] are more convincing under current circumstances. Until we gain experience under the new local television ownership rules we are disinclined to correspondingly relax them on the national level. While we will reexamine this decision in our future biennial reviews of broadcast ownership rules, we intend to proceed cautiously in this area at the present time.

27. Also, elimination of the 12 station numerical cap has already permitted group owners to acquire a large number of stations.[79] The Appendix to this Report provides a snapshot view of the restructuring that has taken place in the broadcast television industry since enactment of the Telecom Act in February 1996. The table lists the number of commercial television stations owned by the top 25 group television owners for 1996 and 2000 ranked by the national audience reach of these television owners. The data show that many group owners have acquired additional stations and increased their audience reach since the Telecom Act's passage.

---

[77] See TV Ownership Order, supra.

[78] These arguments are that eliminating or expanding the reach cap would increase the bargaining power of networks over their affiliates, reduce the number of viewpoints expressed nationally, increase concentration in the national advertising market, and enlarge the potential for monopsony power in the program production market.

[79] The current rule permits a group owner to acquire a VHF station in every market below DMA 47 (i.e., DMA 48 through DMA 210, a total of 163 stations) and still remain below the 35 percent audience reach cap. By holding UHF stations only, a group owner could acquire a station in every market below DMA 10 (i.e., DMA 11 through DMA 210, a total of 200 stations) and still remain below the 35 percent audience reach cap.

28. Moreover, consolidation is a feature of other video media. In cable, the seven largest operators now serve almost 90 percent of all U.S. cable subscribers, which is up from 63 percent being served by the top 10 multiple system operators ("MSO") in 1990.[80] Thirty-seven percent of satellite-delivered national programming networks are now vertically integrated with a cable MSO. In 1999, for example, one or more of the top six cable MSOs held an ownership interest in each of 101 vertically integrated national programming services. In addition, a significant percentage of the top national programming services are controlled by approximately eleven companies, including cable MSOs, broadcasters and other media entities.[81] Of the top 50 programming services in terms of subscribership, 46 are owned by one or more of these 11 companies.[82]

29. The evidence suggests that the television broadcast industry is still adapting to the recent relaxation of the national and local ownership rules and we wish to avoid actions with the potential for disruptive restructuring. For example, applications for duopolies under our new local television ownership rule were only filed this past November and we believe that we should monitor developments under this new rule prior to making any changes to the national television ownership reach cap.

30. We also intend to proceed cautiously because the Commission has previously recognized that a change in the audience reach cap may well influence the bargaining positions between broadcast television networks and their affiliates.[83] We noted that in some situations, relaxation of the national ownership limits could increase the bargaining power of networks by expanding their option to own rather than affiliate with broadcast television stations. In other situations, however, relaxation of the national ownership limits could increase the bargaining position of group-owned affiliates by creating larger, more powerful groups. In its comments, NASA asserts that the national ownership rule is

---

80 Sixth Cable Report, supra at 986; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 94-48, ("First Cable Report"), 9 FCC Rcd 7442, 7514 (1994).

81 Sixth Cable Report, supra at 1058. The eleven are: ABC/Disney, General Electric, CBS/Viacom, News Corp., Time Warner, Discovery, Rainbow Media Liberty Media, USA Networks, E.W. Scripps and Comcast.

82 Id. The four unaffiliated services among the top 50 are C-SPAN and C-SPAN2 (both of which are almost wholly funded by the cable industry), WGN and The Weather Channel.

83 Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates, 10 FCC Rcd 11951, 11960 (1995).

the essential mechanism for maintaining the balance between networks and their affiliates to ensure that affiliates can program their stations in the interests of the communities they are licensed to serve.[84] NASA argues that an increase in the audience reach cap will increase the bargaining power of networks.[85] We believe that in considering relaxation of the national ownership rule we should act cautiously in light of the potential impact of this rule on the bargaining positions of networks and affiliates, particularly given the restructuring that may be taking place concurrently on the local level. We do not believe that consolidation of ownership of all or most of the television stations in the country in the hands of a few national networks would serve the public interest. The national networks have a strong economic interest in clearing all network programming, and we believe that independently owned affiliates play a valuable counterbalancing role because they have the right to decide whether to clear network programming or to air instead programming from other sources that they believe better serves the needs and interests of the local communities to which they are licensed. Independent ownership of stations also increases the diversity of programming by providing an outlet for non-network programming. We do not believe that the role played by independently owned affiliates is any less important today than it was four years ago when Congress determined that the public interest was served by maintaining a national ownership limit, albeit it at a slightly relaxed (35% rather than 25%) level.

4. Comments on the UHF Discount

31. A number of commenters advocate elimination or substantial modification of the UHF discount.[86] These groups argue that the original basis for the discount appears to have fallen away. Specifically, the deficiencies in UHF reception that existed in the early years of television have largely been ameliorated by improved television receiver design and the fact that more than two-thirds of all television homes now receive local signals via cable.[87] ABC maintains that the only television households that might have trouble receiving UHF signals are the 32 percent that do not subscribe to cable. ABC contends that if half of those households cannot receive UHF signals, a 50 percent discount is

---

84 NASA Comments at 2.

85 Id. at 5.

86 ABC Comments at 18-23; NBC Comments at 16; Press Broadcasting and Greater Media Comments at 4-6; and CME, et al. Comments at 17-19.

87 NBC Comments at 16; ABC Comments at 19; Press Broadcasting and Greater Media Comments at 5; CME, et al. Comments at 17-18.